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October 19, 1998

2430.001

BY HAND

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules In Parts 73 and 74 of the Commission's Rules
MM Docket No. 98-93
COMMENTS OF HARDY & CAREY

Dear Ms. Salas:

Enclosed please find the original and fifteen (15) copies of Comments of Hardy & Carey for filing with the Commission in connection with the above-captioned.

If you should have any questions regarding this matter, kindly direct them to the undersigned.

Yours truly,

Bradford D. Carey

BDC/mv
Enclosures

cc: Roy J. Stewart
Chief, Mass Media Bureau (By Hand)

Charles W. Logan
Acting Chief, Policy and Rules Division (By Hand)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules	)	MM Docket No. 98-93

COMMENTS OF HARDY & CAREY

Respectfully Submitted by:

Bradford D. Carey
Hardy & Carey, L.L.P.
111 Veterans Memorial Boulevard
Suite 255
Metairie, Louisiana 70005

Date: October 19, 1998

SUMMARY

The law firm of Hardy & Carey, L.L.P. on behalf of itself, its partners and several of its clients (collectively "Hardy & Carey") hereby advances its Comments in the captioned proceeding regarding review of certain of the Commission's technical rules under Part 73.

Hardy & Carey urges that in no event should the biennial review, through which it is to be determined if some rules can be deleted or relaxed, be perverted into becoming a conduit for increased regulation. While many of the Commission's proposals are on target or nearly on target and are supported in whole or part by Hardy & Carey, others would create increased regulation.

One proposal in particular, which would for the first time require application of a prediction model (a new one at that) to determine whether there is a substantial terrain blockage between the transmitter site proposed and the community of license should not be adopted. There is no need for such a new rule. Worse, there is a critical lack of real world experience with the methodology proposed. Moreover, application of the rule to new technical proposals, but not existing stations, will ensure that many new stations can not compete for effective transmitter sites that are already being used successfully by stations in the same market. Thus, we strongly oppose this proposal. We also oppose the proposal that a new prediction methodology be the only alternative methodology which may be utilized for various showings. Other alternative methodologies have been used successfully for decades and there is no valid reason that they should not still remain available.

Hardy & Carey believes that one of the most important changes that should be made is to permit multiple applications to be concurrently filed for mutually contingent changes to technical facilities. We see no reason why, under appropriate circumstances, this should not include applications based on agreements to accept interference at one or more station(s) and to down-grade or surrender the license of one or more station(s). Licensees already can down-grade an allotment by simple application. There has not been a public out-cry that by employing this procedure, existing licensees are selling out the public interest. We see no reason why a licensee should not be able to down-grade its station as part of a plan to improve one or more other station(s) if the licensee could (as it can now) downgrade its station without any corresponding benefit to other stations. We also think that a licensee should be permitted to move a grand fathered short-spaced station (changing its allotment if necessary) to a new location even if that at that location the allotment is short-spaced *provided* that there is no net increase in short-spacing.

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COMMENTS OF HARDY & CAREY

Hardy & Carey, L.L.P. on behalf of itself and certain of its clients hereby advances the Comments of Hardy & Carey in the above captioned proceeding.[1]

These Comments of Hardy & Carey respond to the *Notice of Proposed Rulemaking and Order* issued by the Commission's in conjunction with the Commission's self described "broad-based initiative to streamline Mass Media Bureau rules, policies and licensing procedures ... in conjunction with [the Commission's} 1998 biennial review..." This, and

[1] The law firm of Hardy & Carey, L.L.P. ("Hardy & Carey") is a national-practice telecommunications law firm. From its New Orleans, Louisiana area offices, it represents before the Commission a substantial number of licensees of AM, FM and Television Broadcast Stations and applicants for construction permits to build new stations. The partners in Hardy & Carey from time-to-time also hold interests in broadcast stations (and applications for permits to build broadcast stations) themselves. Over the years, the attorneys of Hardy & Carey have been involved in the filing of hundreds of applications with the Commission. It is clear that Hardy & Carey has standing, both on its own and as counsel for various broadcast stations to advance these comments.

other pending proceedings, stated the Commission in the NPRM, seek comment on ways to speed the introduction of new and improved broadcast services to the public, provide greater flexibility to broadcasters to improve existing services, and reduce regulatory burdens on applicants.

Hardy & Carey applauds the Commission for its stated intention to provide greater flexibility to broadcasters and to reduce regulatory burdens on applicants. Hardy & Carey is, however, concerned that, while the Commission has clearly stated its intention to reduce burdens and increase flexibility, there is a real danger that this proceeding will actually result with broadcasters having less flexibility and both broadcasters and the Commission will face greater, not lesser, burdens when designing and analyzing technical proposals.

To the extent feasible, these Comments shall discuss the several matters addressed herein in the sequence in which the Commission discussed them in the NPRM.

I. The FM Service is Now Mature;

Further Development is Handicapped Rather Than Advanced by Out-dated Rules.

Many, perhaps most, of the rules pertaining to allotment and application policies and spacings between FM stations were adopted decades ago, when the FM service was in its infancy. Now, with thousands of FM stations on the air, and hundreds more subject to pending and future applications, the service is mature. However, although some of the rules have been changed (*e.g.* § 73.312 (d) now permits the use of terrain calculations based on

digitized data bases) and some rules have been added (*e.g.* §73.215), other rule sections (such as § 73.315) have remained substantially unchanged in decades.

Hardy & Carey respectfully submits that as part of global correction Biennial Regulatory Review, the Commission is particularly obliged to take a fresh look at its rules and consider anew whether they are needed. This must be done from the perspective of the least needed or "zero-based"regulation; not preservation to the extent possible of the status quo.

II. Negotiated Interference in the FM Service

A. Negotiated Interference should be permitted in the FM service

The Commission correctly recognized in the NPRM that increasing congestion in both the reserved and non-reserved portions of the FM band limit options for operating stations to relocate to better transmitter sites and reach additional listeners. Broadcasters have for some time urged the Commission to permit "negotiated interference" agreements to enhance technical flexibility. While the concept of "negotiated interference" may be scary to some, it need not be. No licensee would be forced to agree to accept interference. Thus, those licensees that through intent or neglect pay no attention to applications that seek modification of other facilities or construction of new facilities need have no fear that their facilities will be infringed on. The concept of negotiated interference *per se* includes the

agreement of the licensee(s) of the station that would receive interference. Thus, there is no danger of a station losing coverage without its licensee knowing and agreeing to such loss.[2]

While the different kinds of facility modifications could raise different and perhaps sometimes difficult technical and policy concerns, the fact that "difficult technical and policy concerns" might be raised must not prevent the Commission from adopting the least restrictive rules for the FM service that will assure that stations serve, and are able to serve, the public interest. Negotiated interference agreements should be accepted in conjunction with applications that involve or may involve facility changes to more than one station and contingent applications. Simply stated, the proscription against licensees agreeing to accept interference is a major impediment to the more full development of the FM service. The concept of negotiated interference is neither new nor novel and it is time for it to be available to commercial FM licensees.[3]

In the "Reserved Band," in which non-commercial FM stations primarily operate, the Commission has for some time permitted stations to receive interference in up to 5% of their service area, if a waiver is requested. We are aware of no complaints by the public that such

[2] To safe-guard against the possibility that unauthorized station personnel might enter into agreements to accept interference without the knowledge or approval of the licensee, and to safe-guard against the possibility of fraud, the Commission's rule authorizing negotiated interference could include a provision specifying that upon acceptance for filing of an application which presents an agreement for acceptance of interference, the Commission will issue a "show-cause" type order to the licensee, at its address of record with the Commission, requiring any objection to be lodged with the Commission within thirty days.

[3] The Commission has in the past granted waivers where the interference area would be over uninhabited land or waters, e.g. West Covina, California FM station permitted to relocate closer to Mt. Wilson notwithstanding short spacing due to interference in unpopulated areas.

interference is disruptive of the FM band or otherwise not in the public interest. The Commission long has had a policy that when two or more applications for reserved band facilities (particularly for existing stations to increase coverage) are filed by non-commercial entities, the Commission will send the applicants a "ninety day letter," urging the applicants to reach an agreement between themselves to resolve the mutual exclusivity of their proposals. While in theory the notion of negotiating for interference may not be precisely the same as is the notion of negotiating for coverage, in reality the processes and outcomes are much the same. We are not aware of any complaints f rom the public that by permitting, even encouraging, non-commercial FM applicants to negotiate among themselves to resolve coverage issues the Commission has failed to fulfill its obligations. Moreover, in its recent proceedings related to the initiation of Digital Television ("DTV") Service, the Commission adopted rules that specifically permit a station to interfere with the reception of one or more other stations, even without the consent of the station to be interfered with. Moreover, the Commission found it to be in the public interest for licensees to be permitted to enter into agreements between themselves pertaining to interference matters and channel swaps.

The Commission long has held that in the FM service, a station's service area is that area which results from application of the minimum distance spacing tables of the rules. Those tables have, however, been altered by the Commission several times. Thus, we now have stations that are locked into coverage less than that of a full Class A station broadcasting with 6kW ERP at an antenna height above average terrain of 100 meters. Some

stations simply can not make the increase in power from 3 kW to 6 kW under the existing rules, while, on the other hand there are some grandfathered Class B stations operating with power and or antenna heights above average terrain well in excess of the maximum that would be permitted today. Moreover, many Class A stations today are "grandfathered" to the extent that the licensee can make almost no changes to the station because of the minimum spacing rules. Under the present rules, even where one licensee owns two or more adjacent co-channel or adjacent channel stations, it may not improve coverage of one, if to do so would cause the other to receive interference.

In the reserved band particularly, the existence of one station with perhaps minimal facilities may block the expansion or creation of a station which would serve a much greater area and larger population. Providing that a residium of service would remain if the application for the new or increased facility were granted, and the licensee of the small facility concurs, it is clear the public interest would be better served by granting the large area application and canceling the license of the small area station.[4] The Commission is well able to protect against proposals that would create white or gray areas that are not overall in the public interest. In addition, agreements to terminate a community's only local

[4] Hardy & Carey is aware of one instance where four non-commercial educational FM stations would have been able to make major increases in coverage through frequency swaps were it possible to have deleted a very low power non-commercial FM station. The licensee of that station was in agreement with the overall proposal and the area would have remained fully served. However, the informal advise of the Commission's staff was that it was highly unlikely that the Commission would permit the deletion of one station for the improvement of four *even if* a waiver of the contingent application rule were granted to permit the filing of applications. The increase in populations covered by the several stations, net of the population that would have lost one station (out of a full dial of stations), would have been several hundred thousands of persons.

transmission service should be considered on a case-by-case basis and should take into account the availability of other services and the possibility of restoring local service with either an AM or FM station. An applicant proposing to terminate a service should be permitted to make a public interest showing, if necessary, to demonstrate that grant of the application would be in the public interest.[5]

B. Agreements Involving Applications That Would Cause New or Increased Interference

Hardy & Carey submit that it is no longer necessary for the Commission to be reluctant to permit the creation of interference within a station's protected service contour. [6] The Commission's prior concerns that this policy would lead to further clustering of stations in urban areas in contravention of Section 307(b) of the Act no longer is relevant. In the past, the Commission opposed such proposals on spectrum efficiency grounds and because grant of interference-creating applications could effectively foreclose facility improvements by stations receiving new interference. In most populated areas of the continental United States, there is now virtually no substantial spectrum left for new proposals. Moreover, as acknowledged in the NPRM, many existing stations may not make any changes without creation of, or changes to, areas of co-channel and/or adjacent channel interference.

[5] For example, a very low power station is exceedingly spectrum inefficient.

[6] Moreover, use of PTP methodology may permit more precise calculations.

The Commission has noted that it is cognizant of its obligation to reevaluate regulatory standards over time and to modify policies in response to changes in the broadcast industry. And as discussed above and acknowledged by the Commission, radio is truly a mature service with over 10,000 commercial AM and FM stations and nearly 2,000 NCE FM stations competing for listeners.

Congestion in the FM band now prevents the further "urban clustering" of stations. Thus, there is no risk of broadcast licensees running amuck and subverting the effect of section 307(b) of the Communications Act of 1934, as Amended (the "Act") if the Commission now gives licensees greater freedom in modifying their facilities to meet changing market needs. Were there spectrum available in major markets, someone would have already proposed adding another channel to the market. It is just not possible, with perhaps a few exceptions, to move an existing station from a rural area into an urban area.

Particularly in view of the Commission's rules permitting broadcasters to change the community of license of their stations, we believe that the Commission could now delete the requirement that a commercial FM station place a 70 dBu signal over its community of license. The lack of a similar requirement of non-commercial FM stations has hindered neither the listening public nor the effectiveness or the dedication of the stations to serve their communities of license.

In view of the labored discussion in the NPRM and the discussion below of how to calculate the various contours and which of several methodologies should be used, it makes

sense to simply delete the requirement. Again, since this is a regulatory review, it is appropriate that a rule that no longer is clearly needed must be deleted.

Until a few years ago, an FM allotment could be down-graded only through a rule making proceeding. Thus an incumbent licensee could not unilaterally have a wide-area service that had been allotted to the community down-graded, even if to do so would permit the licensee to better serve the changing needs and population patterns of the community of license. A few years ago, the Commission amended its rules to permit the licensee of a station to down-grade the allotment simply by application for, and construction and licensing of, lesser class facilities. Removal of this rulemaking barrier has permitted many stations to make facilities modifications to better serve the public that would not have been made otherwise. Hardy & Carey submits that if a licensee may "walk-away" from some of its coverage area by voluntarily down-grading its station's facilities, there is no justification for the Commission not permitting the licensee to agree to accept some interference (real or theoretical) in its coverage area.

Removal of unnecessary barriers to licensees improving service will help the Commission fulfill its commitment to relying to the greatest extent possible on competitive communications markets rather than resource-intensive regulatory policies to safeguard the public interest. The idea that the Commission must stand ready to protect stations from their own economic folly is neither desirable nor necessary from the stand-point of the public or licensees. Any theory that the market will not drive service to where it is needed is fatally

flawed. No area is so economically depressed that no broadcaster will try to serve it; especially with a service as mature as radio broadcasting.

If a station fails to serve the public interest, it will likely end up being owned by another licensee who better understands the public interest. Moreover, were it possible for a station to creep (or leap) from a rural or suburban setting into major urban area, the spectrum that it left behind would become available for the creation of new stations or the upgrade of existing stations. Thus, while stations would be more densely packed together, the overall number of stations would increase and the number of reception services that every one, urban, sub-urban and rural, have would increase. Thus, fears that stations would use the new rule as a tool to move closer to large population centers and leave rural areas unserved are without merit. If some licensees find a way to move their stations closer to the urban centers, others will move into the areas vacated and more stations can be allotted in any newly vacant spectrum.

The Commission now has several years of experience with the contour protection provisions of §73.215 under which applicants provide the Commission with detailed analysis of the area which is to be served by their proposals, the interference contour of the proposal and the service area of neighboring stations. In applications for the reserved band it is often necessary for the applicant to demonstrate the areas and populations that will gain and lose service. In contested allotment proceedings, it often is necessary for proponents to demonstrate the relative gains and loses of several competing proposals. Thus, analysis of

gains and loses of proposals is neither new nor novel and is well understood by the broadcast industry and the Commission's staff. Therefore, there is no reason to expect applicants to have difficulty presenting to the Commission their proposals and the Commission analyzing them.

III. Other Proposals to Give Stations Greater Technical Flexibility

A. Introduction

Consistent with its goals, the public interest and the Communications Act, the Commission may, indeed should, decrease its regulation and open its doors to new ideas and alternative methods of presenting ideas. However, Hardy & Carey submits that the public interest would not be furthered by the Commission arbitrarily turning its back on technical calculation methodology that has been in use for years and is well understood by broadcasters and the Commission. This does not, however, mean that new methods of calculation might not also be helpful to both the Commission and licensees; rather, it means that any new methodology should augment, not supplant, the existing calculation methodologies.

B. The Point-To-Point Prediction Methodology

In the NPRM, the Commission suggested that contour protection has generally worked well in fostering interference-free service in the FM band, but acknowledged that it is not perfect. Because of the limited length (3 to 16 kilometers) of the radials used to

determine antenna height above average terrain, the Commission's standard propagation methodology does not accurately account for all terrain effects.

In the NPRM, the Commission set forth a supplemental point-to-point ("PTP") prediction model, which the NPRM stated was designed for the purpose of providing a more accurate prediction of interfering contours. The Commission proposed that an applicant may use the PTP method to calculate interfering contours for the purpose of demonstrating compliance with the Commission's various overlap/interference requirements, but indicated that it would impose restrictions on its use. Based on a technical analysis of the PTP prediction method reviewed by Hardy & Carey, Hardy & Carey submits that PTP could be a valuable tool for the FCC and broadcasters. However, it does not appear that it would be wise or appropriate for the Commission to make it the sole standard alternate coverage prediction method for those instances where alternate showings might be accepted. Broadcasters, consulting engineers and the Commission's staff have spent years understanding the peculiarities of and relationships between the FCC standard contour prediction method and the TIREM and Longley-Rice methods. Even though Longley-Rice does not produce an isocontour, it has been used quite successfully for years by VHF broadcasters, and dismissing from consideration any alternate showing using it would be discarding valuable information derived from a known-working propagation model based on good science.

Since the Commission asserts that the PTP methodology more accurately incorporates the effects of terrain into the prediction of coverage, Hardy & Carey does not oppose amendment of the rules to permit the use of PTP calculations by both applicants and objectors to resolve any questions raised regarding compliance with § 73.315. Hardy & Carey does strongly except to the Commission's proposal to treat the PTP calculations as controlling. In those few cases where there are likely to be true differences, applicants and objectors should be free to make their arguments based on the methodology they believe is most appropriately applicable and explain why their proposed methodology should be accepted.

PTP must not become the standard for review of terrain between transmitting antennas and communities of license.

The Commission's proposal to require applicants to submit a PTP contour study of terrain between a transmitter site and its, community of license on which the application will be either granted or denied is ill founded and must not be adopted for several reasons.

The industry has no experience with PTP.

PTP has not been demonstrated to lead to results any more consistent than are the old rules that were created decades ago.

Existing stations that currently cover their community based on the standard prediction method, but fail to satisfy the PTP methodology, would be exempt from a PTP determination provided they do not propose to relocate transmission facilities or withdraw

coverage towards the community of license. This will assure that there will be grave disparities between those stations now well situated and those trying to become better situated or first commence operations, if for no reason other than the new facilities will face another, needless, regulatory hurdle.

Application of this proposed new rule would be arbitrary and capricious if for no reason other than because it would discriminate in favor of those stations now well situated and against those who are not well situated in the same market. Indeed, this rule would seemingly prohibit a licensee from co-locating a station it acquired in a market with another it already owns in the market, if the licensee could not demonstrate through this new methodology that the community of license service requirement is met from the site.

Moreover, imposition of this new requirement would further disadvantage start-up stations because they might not be able to locate where their competitors are sited. Since many minorities enter broadcast ownership by either building a new station or by acquiring a station that is not thriving, the imposition of this additional requirement on the new or growing station that is not now well situated might keep it from co-locating with the established stations. This will serve to impose yet another hurdle in the way of minority and small business concerns that dare to try to compete with the established stations.

While we do not object to the optional use of PTP methodology in instances that require the calculation of 3.16 mV/m coverage, including compliance with main studio requirements of § 73.1125 and demonstration that an allotment, when considered at

maximum Class facilities, would comply with Section 73.315 with respect to the community of license (if use of a supplemental method is warranted consistent with existing precedents) we strongly object to any attempt to codify what has been an admonition that there be no major terrain obstructions between the transmitter and the community of license. We believe that our approach here is consistent with that of the Commission with respect to DTV transmitter site selection; see no justification for the imposition of yet another regulation, and therefore oppose it.

It seems that only recently and sporadically has the Commission's processing line staff on its own initiated analysis of the terrain between a proposed transmitter site and the community of license. We respectfully submit that an admonishment to application planners should not become a de-facto processing line standard, whether applied consistently or sporadically. Notwithstanding the arguments presented herein about the PTP method, Hardy & Carey submits that neither a rule nor admonishment regarding the terrain between the transmitter site and the community of license is necessary. The industry is now fully experienced with transmitter site selection. The existing admonition would have been only productive when the service was new.

We have heard anecdotes suggesting that the processing line staff is applying a 5 db penalty for clutter when conducting Longley-Rice calculations of paths from transmitter sites to communities of license. We see no lawful basis for such actions, if they are occurring.

In view of the fact that the Commission is to be reducing, not increasing, regulatory burdens in this Regulatory Review, we question both the wisdom of, and the legal basis for, adoption of additional regulatory burdens, specifically the transmitter to community of license path analysis. We are aware of one situation where a Class B1 station, serving a community license of 1,100 people, will be prohibited from moving to serve an additional 50,000 people if the application were subjected to the analysis order of the Longley-Rice method. We fail to see how application of a new rule in these circumstances would advance the public interest and we see no justification for the addition of new regulation under the guise of a regulatory review, which should result in less, not more, regulation.

Hardy & Carey advances no objection to the proposed use of PTP methodology to demonstrate that the standard prediction method *overstates* the area encompassed by an analysis under the Longley-Rice method. In the proposal to prohibit the use of the PTP methodology to extend interfering contours beyond the standard F(50,10) predicted curves for the purpose of demonstrating harmful interference received.

We concur that generally it is not appropriate to consider PTP showings in the context of demonstrating compliance with the multiple ownership requirements of Section 73.3555, although we would leave the door open for waiver requests based on "good cause shown," in view of the fact that alternative showings are only advanced when the presenter feels that the standard methodology of part 73 does not accurately depict the situation.

We concur with the proposal to delete the long-stayed terrain roughness provisions from 47 C.F.R. § 73.313(f) through (j) and Figure 4 of 47 C.F.R. § 73.333 from the Commission's Rules as they apply to the FM broadcast stations.

C. Commercial FM Technical Requirements: Amendments to Section 73.215

1. Reduced Minimum Separation Requirements in Section 73.215(e) for Second- and Third-Adjacent Channel Stations

Hardy & Carey interposes no objection to the proposed 6db adjustment to the minimum distances for second and third adjacent channel distances. This may provide some relief to a few stations that are shoe-horned into their present sites.

D. New Class C Height Above Average Terrain Requirements

The coverage of most FM stations goes, for practical purposes, well past the station's protected contour (however reasonably calculated) unless there is a co-channel station, the coverage of which abuts that of the first station. In many rural areas, this coverage with less than a 60 dBu signal, like the sky-wave coverage of AM clear channel stations late at night, is what provides radio service. Thus, we believe that this coverage beyond the 60 dBu contour that many stations, particularly Class C stations, provide can not be ignored or lightly dispensed with. On the other hand we are also aware that a significant amount of spectrum could be recovered for other uses under the Commission's proposal to down-grade Class C stations that are not operating with 100 kW ERP at a height above average terrain of 450 meters.

We believe that if the Commission is to pursue this proposal, it must give the Class C stations adequate time to plan, obtain authorizations for, and construct the upgraded facilities. In view of the increasing complexities with procuring tower space (due in part to the conversion to DTV), and the increased local zoning and air hazard clearance problems facing broadcasters, several years will be required for almost all upgrades and as much as ten years may be required for some.

Hardy & Carey submits that if the Class C stations that are not operating with a HAAT of at least 450 meters are to be down-graded, the public will benefit more if spectrum were to be made available first to other existing stations for upgrades and then for the creation of new allotments.

In view of the "negotiated interference" concepts discussed above, it seems reasonable that a Class C licensee that does not intend to upgrade, or is prohibited from upgrading, might be amenable to entering into an agreement with a neighboring station for it to "interfere" in the spectrum that would be unused.

Hardy & Carey suggests that if the Commission determines to proceed to down-grade under-built Class C stations, it permit the licensees of Class C stations that are not operating with an antenna HAAT of 450 meters and either do not want to meet, or are blocked from meeting, the new minimum HAAT to enter into agreements with the licensees of existing co-channel or adjacent channel stations for the filing of mutually contingent applications.[7] The

[7] This should also apply to stations with I.F. spacing relationships.

application for a construction permit being filed by the station that is (to be upgraded or moved) to occupy the spectrum being released by the under-developed Class C station would be bundled with an application filed by the licensee of the under-developed Class C station for a down-grade in allotment to C-0, contingent on the grant of the other application. There should be no limitation on the consideration that might be exchanged for such agreements. Any limitations would discourage licensees from making such agreements.

We propose that such agreements be accepted by the Commission and processed as a package under the mutually contingent application rule modifications discussed below.

E. Streamlined Application Processing Changes

1. Introduction.

Hardy & Carey believes that there are many possibilities for the Commission to stream-line its application processing procedures without compromising the basic goals of the Commission.

2. Extending First Come/First Served Processing to AM, NCE FM and FM Translator Minor Change Applications.

Hardy & Carey believe that changes in these rules are justified; or, more aptly stated, these rules no longer can be justified in their present form. For example, there is no reason why an NCE-FM, FM translator or AM minor change application is not afforded "cut-off" protection as of the date of its filing, as are commercial FM minor change applications.

3. Revisions to the Definition of "Minor" Change in AM, NCE FM, and FM Translator Services

We believe that the AM band is sufficiently established and mature that the Commission need no longer delay the processing of applications to increase the power or move the transmitter site of an existing AM station and engage in complex processes to afford stations an opportunity to file an application, knowing that it will conflict with an earlier filed application. When the Commission had hearing processes to chose which among competing applications, there was a system, albeit far from perfect, to select an application as being preferred under the Commission's criteria. We see no need for the Commission to conduct, or value in the Commission conducting, an auction between a "first filed" applicant for a minor change and those who would file on the heels of the first filed, with the almost inevitable result that some later filings would be filed more with the hope of blocking the first applicant than actually increasing the coverage of the later station. Thus, it is appropriate that for AM stations, a minor change be expanded to include an increase in power and/or a transmitter site change.

NCE-FM interests have long supported the current cut-off system for major changes. We think that a minor change could be expanded to include mutually exclusive channel changes without substantially undermining the current system of cut-off notices and an opportunity to file competing applications for major changes. And, for minor changes, we do believe that the Commission's proposal that an application be afforded cut-off status from

the day on which it was filed is meritorious and should be granted. The public interest will be furthered by applicants knowing that if they are the first to file a minor change, their application will be granted and not subject to later counter filings. Also, the opportunity for substantial improvements to stations through mutually contingent changes is at its greatest in the reserved band. Thus, reserved band stations should be permitted to file mutually contingent applications.

We do, however, believe that the current distinctions between "minor" and "major" changes for NCE-licensees serve important purposes. NCE-FM licensees often do not have the resources or sophistication to monitor spectrum availability and application proposals on a continuous basis.[4] And, those that do have someone monitoring the FCC's daily releases often need time to arrange financing and obtain institutional approval to file an application. Thus, with the exceptions stated, we believe that the public interest is well served by the current major/minor change rule for NCE-FM stations in the reserved band.

F. Relaxed Noncommercial Educational FM and Translator Technical Requirements

Hardy & Carey supports, in principal, any proposal to reduce the paperwork required of licensees and permittees and changes to the Commission's Rules to delete or stream-line

[4]A site move or other change by an existing station, or the cancellation of a construction permit may open up spectrum for an upgrade by an existing station that would not have been possible earlier. We think that it is fair that other existing (and potential) NCE-FM spectrum users should have notice and an opportunity to file applications in competition with those that seek significantly more spectrum. Particularly where, as in the reserved band, a few entities have hundreds of authorizations and applications, the "inside" knowledge each of these large entities would have as to when it might surrender one authorization would give it an unsurmountable advantage because it could file for what now constitutes a major change on the day after it surrendered an authorization, which would be well before any public notice would be issued, knowing that no one else could file for it.

unnecessary regulations and filings are particularly appropriate regulatory review. Provided that the Commission's Broadcast Applications and Actions notices are sufficiently worded to give notice that spectrum once occupied by a translator is now available for other usage, we see no reason not to permit a "one-step" power decrease.[5]

Hardy & Carey concurs with the Commission that the 10% limit on minor changes to FM translators results in needless processing of applications for relatively small transmitter site moves and/or power changes. We do not believe, however, that the Commission should permit such large changes as proposed. Hardy & Carey suggests that the Commission adopt 50% as the ceiling for a minor change for an FM translator. This will give licensees, under most circumstances, an adequate area in which a transmitter site may be moved under the minor change provisions, should it be necessary to relocate a translator. We believe that a mutually exclusive channel change might also be permitted under the minor change rules.

In addition, FM translator licensees may resolve an interference complaint by a reduction in power. In this instance, the two-step process delays the resolution of the interference problem. There is no reason not to permit it!

[5]We do continue to be concerned about the ability of a few entities to manipulate the Commission's proposed revised application processing procedures. Again, we think that such changes should be limited to minor changes. We also believe that the Commission has, and should use, the authority to initiate hearings should it appear that its processes are being abused.

1. Second-Adjacent Channel Interference Ratios for Predicting Prohibited Overlap in the Reserved Band

There appears to be no justification for a standard for adjacent channel protection within the reserved band that is more stringent than there is in the non-reserved band. Thus, Hardy & Carey supports the proposed rule change. We note that the provisions of §73.525 that protect television channel 6 viewers from interference from reserved band NCE-FM station are based on desired to undesired signal ratios. Hardy & Carey believes that to the extent that adjacent channel protections have been (or are being) relaxed in other contexts, the Commission should similarly adjust the protection ratios of §73.525.

2. Minimum Coverage of the Community of License by NCE FM Stations

The Commission now proposes, with exception that it will grandfather existing stations, to require that NCE-FM stations place a 60 dBu signal over at least part of the community to which the station is licensed. We see no reason why, after several decades of operation under the present rule, regulatory review should be contorted by the establishment of new, more restrictive rules. The Commission writes about reducing regulation. This proposal would regulate NCE-FM stations in ways and to degrees which the Commission has never regulated them, with no apparent public interest benefit. Simply stated, we are aware of no pressure on the Commission from the public for this kind of increased regulation.

3. Revisions to Class D Rules

The Commission's NPRM spends much time discussing the situation of the few remaining Class D non-commercial stations. There are but 70 of them left, according to the NPRM. Of that small number, by the Commission's calculations only 38 are causing interference to class A or higher NCE-FM stations. For more than two decades, NCE-FM licensees have been on notice that after a date certain (which has passed a long time ago), the license of a class D could be forced to alter frequencies or cease operations. Now, after the bulk of stations have complied, the Commission seemingly is changing the standards so that all will comply with the rules, even if they have made no attempt to comply. We believe that a rule change now is unwarranted. For the smattering of grandfathered stations that might benefit from the rule, the Commission's existing waiver mechanism should provide relief.

We also are concerned that giving class D stations the right to trade their elevation for power will result in stations with more than the present 10 watts causing increased penetration and exacerbating any interference that they may cause because of short-spacing. In no event should a translator be able to become a class A station without the licensee following the complete application processes for a full station.

IV. Additional Technical Proposals

Hardy & Carey submit that additional rule changes are warranted at this time. The proposals discussed above will, if adopted, reduce the regulatory burdens on, and give additional flexibility to, many broadcast stations. Yet, no relief is proposed for some of the

stations that are the oldest and have the least spectrum flexibility. Many FM stations are short-spaced under the present rules. They may not move, except in limited measures.

A. Grandfathered short-spaced FM Allotments.

We urge the Commission to modify its rules to permit those "grand fathered" short-spaced stations to modify their facilities where an equal or lesser sized interference area would be created than exists presently. Certainly, if the Commission does determine to permit negotiated interference, these stations must be permitted to afford themselves of that rule provision liberally. And, where the stations giving and receiving interference present to the Commission an agreement for the interference (whether or not the stations are co-owned), it should be assumed that, based on the agreement, grant of the application(s) is *prima facie* in the public interest.

Also, if the licensee of a station that has "grand fathered" short-spacings desires to change the community of license of the station, and the other requirements for change of community of license are met (*e.g.* a more preferential arrangement of allotments), then the Commission should permit the change of the community of license notwithstanding that the allotment and the transmitter site would continue to be short-spaced. (In essence, the station, after the change of community of license would not be any more short-spaced than it is presently and no new short-spacing would be created).[6]

[6] If the Commission desires to continue to maintain its rubric that it has never knowingly granted a short-spaced allotment, it need only term changes to grand fathered allotments as such or as "improved allotments."

B. One Step Change of Community of License.

Presently, when a licensee determines that it would be better for its station to be licensed to another community, it must file a petition for rule making; then comments in support of the proposed rule making; then (if the table of allotments is amended) an application for a construction permit and, after that is granted, an application for a modified station license. This procedure applies even if the transmitter is not to be moved and there are to be no technical changes. This system is fraught with unnecessary paperwork for the licensee to prepare and the Commission to process. The procedure could be completed in a matter of a couple of months, but now it takes about two years.

We propose that the rules be amended to provide that where no technical changes are part of a community of license change, the licensee simply file an application on FCC Form 301 for a construction permit to change communities, without technical changes. The Commission would give notice of the receipt and processing of the application as it now does and would publish in the Federal Register the fact that an amendment of the table of allotments to substitute communities of license is being sought. The licensee would publish local notice in the newspaper as is required for major changes. The Commission should be able to grant uncontested change applications within three to four weeks after the expiration of a thirty day period after publication in the Federal Register. If not opposed, the application should be entitled to a presumption of being in the public interest, and granted.

C. Allotment Reference Coordinates

The Commission and broadcasters now have several years of experience with the contour protection standards of §73.215. Hardy & Carey respectfully submit that the Commission now can safely delete some of the provisions that it adopted when it first permitted the contour protection provisions of the rules. Presently, when proposing a "one-step" upgrade, it must be demonstrated that a fully spaced "reference site" exists, even though another transmitter site may be specified in the application. We respectfully submit that it no longer is necessary for an applicant for a one-step upgrade to demonstrate a fully spaced site. We do not see a useful purpose for the rule; it already is essentially irrelevant and it will be more meaningless if the Commission's proposals discussed above are adopted. For instance, if a licensee enters into an agreement to accept interference in a portion of its coverage area, of what use is the reference site? The area of interference will be based on the actual transmitter site(s) and the actual terrain; not some arbitrary location. We believe that the preparation and Commission processing of applications for contour protection based upgrades will be expedited significantly if the rubric of a fully spaced reference site is given a well deserved burial and the applications can be processed in one-step.

D. A Hypothetical Example

Assume a Class A station (for the sake of identification, call it KAAA) that is grandfathered into what is now a short-spaced allotment. It is situated on the border of two cities, one of which is the community of license and has a population of 75,000 people and other aural services. The other city, which has a population of 150,000, has no local service.

There is no fully spaced reference site which KAAA could specify; however there are sites from which KAAA could sufficiently serve the community of 150,000 including its present site. If KAAA were to move to the larger community, another station, (KBBB) could and would move to the community of 75,000, leaving behind a community of 5,000 that is well served by multiple aural services. The net effect of these changes would be that about 2 million persons in the combined service area would each receive at least one more service than they do presently. Clearly, such an increase in service would be in the public interest. Yet, rigid adherence to antiquated allotment policies (such as not permitting a short-spaced station to move even if it does not create new or greater interference and then not permitting another station to slip into the spectrum that would be vacated) well may make these improvements impossible.

We do find it curious that the Commission has expended a lot of staff time contemplating how to best help Class D NCE-FM stations that have known for twenty years that they might have to change frequencies or cease operations, but, apparently, little initiative has been expended on how to help some of the country's oldest, and hence most "land-locked," FM stations. We respectfully submit that either the Commission should amend its rules to give more flexibility with respect to spacing matters or liberally grant waivers of its spacing rules where no net increase in interference would be caused.

E. Citygrade Coverage

Those stations that are short-spaced or have limited room in which to manoeuver face particular problems in making facilities changes. Often the communities of license have

grown. In many cases, annexation of land has caused significant growth in the size of the community of license; in other cases, a portion of the land within the confines of the community of license might not have been covered by the 70 dBu signal.[7] It has not been considered by the Commission to be a problem if only a small portion of the community did not receive the 70 dBu signal. Now, however, decades after these grand fathered stations were constructed, the area in which a 70 dBu signal is not placed may contain half or more of the population and there may be no site from which all of the Commission's rules would be met. Therefore, we question whether the 70 dBu community of license minimum remains necessary and now its application will not become increasingly arbitrary. Perhaps the 60 dBu signal which the Commission proposes cover some the of the community of license of non-commercial stations should be the standard for commercial stations as well as non-commercial stations. While there are many low power NCE-FM stations, there also are many high power ones, including grandfathered stations that are over height and/or over power. And, many NCE-FM stations have substantially more power than do some of the oldest class A FM stations.

The current community of license signal requirements actually prohibit the establishment of some new stations that could be viable, particularly in the inner city areas. In large urban areas, there may be some spectrum that is available for a new class A station that can not even be allocated because of the inability of the allotment to meet the citygrade coverage requirements.

[7] In some communities it is not possible to construct a transmitter site that meets all rules.

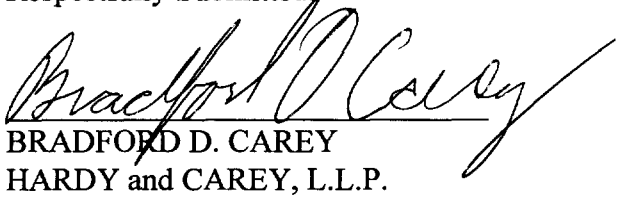
F. Use of FM Boosters to Cover the Community of License.

Under the present Commission standards, many stations are prevented from most effectively covering their communities of license and the surrounding area because of the natural terrain features. Simply stated, not every community of license is located near a high bluff that overlooks the entire community. Sometimes, there are multiple bluffs and ravines in a community and it is not possible to cover even 75% of the community with a 70 dBu signal. We do not think that in drafting section 307(b) of the Act, Congress intended for communities that can not be covered with a 70 dBu signal to be left without local service. However, if a broadcaster can not find a site from which the city of license will receive a 70 dBu signal , the community can not have "its own radio station for local self-expression." Hardy & Carey believes that most communities would prefer to have a service licensed to it, that covers the community with a signal of as little as 60 dBu, than to have no local service. Hardy & Carey submits that where the 70dBu requirement blocks a city from having its own station, or having a station that could survive economically, the 70 dBu citygrade rule is inconsistent with section 307(b) of the Act.

Hardy & Carey urges that it is time for the Commission to take a fresh look at the use of on channel boosters. Presently the Commission prohibits the use of a booster to achieve the required 70 dBu predicted contour over the community of license. It is now time for the Commission to permit the use of boosters to cover the primary station's community of license so that those stations with irregular terrain also may have local service.

In summary, we urge that the Commission make substantial changes to its rules to give licensees and applicants the maximum flexibility to design and move their stations to meet the needs of their service areas and populations. Where the rules can not be changed, we challenge the Commission to start taking "a hard look" at waiver requests and not for reasons to deny them, but for ways to work with licensees to grant them. Members of the Commission's staff should be encouraged and rewarded for working with broadcasters to find innovative ways to maximize facilities, rather than trained how fastest to reject an idea and how to sit on a waiver request the longest before denying it.

Respectfully Submitted,



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